

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6846 OF 2006

Nirmalaben Kaniyalal Oza & Anr. ...Petitioners
V/s.
Gopal Niwas Co-op.Housing Society
Limited. ...Respondent

Shri V.M. Joshi for the Petitioners.
Shri V.B. Mahadik with Shri S.S. Redekar for the
Respondent.

CORAM : V.M. KANADE, J.

DATED : MARCH 12, 2007

P.C. :-

1. Heard the learned counsel for the petitioners and the learned Counsel for the respondent.

2. The petitioners are challenging the order passed by the Co-operative Appellate Court dated 19th August, 2006 whereby the appeal filed by the respondent society was allowed and it was held that the Co-operative Court had jurisdiction to adjudicate the dispute filed by the society on merits as per the provisions of law and the Maharashtra Co-operative Societies Act, Rules and the Bye-laws of the society.

3. Brief facts are that the petitioners purchased a

flat in Gopal Niwas which flat was situated on the terrace. Subsequently, a co-operative society was formed and the builder sold the property by a conveyance to the co-operative society. The society did not make the present petitioners as members of the society. It is the contention of the petitioners that the builder had sold the flat and the adjoining terrace to them, therefore, the society did not have any right in respect of the terrace. The dispute was filed by the respondent in the Co-operative Court under Section 91 in which various reliefs were claimed including a relief of injunction asking the petitioners herein from removing iron grill and the lock which they have put to their terrace and for other consequential reliefs. An application was made by the petitioners herein for dismissal of the dispute on the ground that it was not maintainable under Section 91 of the said Act. The trial Court allowed the application filed by the petitioners, however, the appellate court allowed the appeal of the society.

4. The learned Counsel for the petitioners

submitted interalia that the appellate court had erred in holding that the Co-operative Court has jurisdiction. He submitted that the issue of jurisdiction being a mixed question of fact and law, it was the duty of the appellate court to have given an opportunity to the parties to lead evidence in that matter. In support of the said submission, he relied upon the Division Bench Judgment of this Court in the **Meher Singh Vs. Deepak Sawhny and another reported in 1998(3) Mh.L.J. 940**. He also submitted that even on merits, the Co-operative Court did not have jurisdiction, firstly, the petitioners were not members of the society and declaration as sought by the respondents-society regarding the agreement being void, could only be granted by the civil court.

5. The learned Counsel for the respondent, on the other hand, submitted that the society initially had filed a suit in the City Civil Court, however, in the City Civil Court also, the petitioners had taken objection regarding the jurisdiction and when the present dispute is filed under the Co-operative

Societies Act, again preliminary issue is raised regarding the maintainability of the dispute in the Co-operative Court.

6. In my view, it is not necessary to go into the controversy regarding the maintainability of the dispute in the Co-operative Court, at this stage. Since the issue of jurisdiction is a mixed question of fact and law, the Co-operative Court ought to have decided the issue after both the parties had lead evidence on the question of maintainability. In my view, therefore, it is not necessary to go into other submissions which are made by both the learned counsel. The ratio of the judgment in **Meher Singh's case (supra)** will squarely apply to the facts of the present case and as provision of Section 9 are analogous and the same principle would apply to the dispute which they have filed before the Co-operative Court. Similarly, it would be advisable for the Co-operative Court to decide all the questions and issues altogether instead of deciding two issues in a piecemeal manner as much time has elapsed in that questions. In my view, therefore, the order passed by

the appellate court will have to be modified partly.

7. The impugned order passed by the trial court which is set aside by the appellate court, is confirmed. However, the trial court is directed to frame all issues or points for determination including the point regarding the maintainability of the dispute in the Co-operative Court. The Co-operative Court also to permit the parties to lead evidence on issues and other issue which are framed by it and decide the case on jurisdiction on merits by passing one final order.

8. With these directions, the impugned order is modified, accordingly. The trial Court to decide the dispute, as expeditiously as possible and in any case, within a period of one year. It is clarified that all other contentions are kept open.

(V.M. Kanade, J.)